



October 4, 2001

VIA ELECTRONIC FILING

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, SW- TW - A235
Washington, DC 20554

Re: In the Matter of Application of SBC Communications, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri; CC Docket No. 01-194.

Dear Ms. Salas:

Attached are the Associations for Local Telecommunications Services (ALTS) Reply Comments in response to the Commission's *Public Notice* issued August 20, 2001 in the above captioned proceeding.

Sincerely,

/s/

Kimberly M. Kirby
Association for Local
Telecommunications Services



October 4, 2001

VIA ELECTRONIC FILING

Ms. Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: In the Matter of Application of SBC Communications, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri; CC Docket No. 01-194.

Dear Ms. Attwood:

Please accept this letter as the Association For Local Telecommunications Services' (ALTS) Reply Comments in the above-captioned proceeding. Please note that ALTS has filed comments in every Section 271 proceeding that has either been approved or denied since the date of the first approval on December 12, 1999 (Bell Atlantic – New York; CC Docket No. 99-295).

This Application should be denied outright. ALTS has stated in previous section 271 filings that the Telecom Act calls for either one or two actions from the Commission in reviewing a section 271 application for approval: deny or approve. Instead, the Commission has moved to a standard of “fix and re-file,” or “approve upon future promises.” Since the first applications filed more than four years ago, the 271 process has been steadily eviscerated -- the benchmarks of “irreversibly open to competition” and “no promises of future compliance” have been eroded. The legal and factual guidelines set out in the Telecom Act for Section 271 have been essentially gutted. Moreover, there appears to be little, and no Regional Bell Operating Company (RBOC) expectation of, enforcement of backsliding.

The Enforcement Bureau, created almost two years ago, has proven to be effective only for those consumers plagued by endless long distance slamming practices. The incumbents, on the other hand, have felt little to no pain the past year as the Market Disputes Resolution Division has inflicted nothing more than a couple hundred thousand dollars for proven anti-competitive practices. Although the Enforcement Bureau has the

authority to levy fines on the ILECs for anti-competitive behavior, less than \$300,000 in fines has been issued this year. Yet CLECs report innumerable problems throughout every region and continue to be frustrated by the inability of regulators and/or lawmakers to take any meaningful action to enforce the rules necessary for local competition to thrive.

The goal of the Enforcement Bureau, presumably, was "...enforcement of the Communications Act, as well as Commission rules, orders and authorizations."¹ Yet the CLECs continue to struggle with the ILECs while an estimated 67 complaints filed with the Enforcement Bureau either never make it due to "denial" by the Enforcement Bureau, sit idly, settle, or are withdrawn. Few complaints have resulted in enforcement action by the FCC and CLECs wring their hands in frustration as millions of dollars are lost on a daily basis. Moreover, the FCC appears to take little action on its own but rather wait for CLECs to file claims even where there is evidence of RBOC non-compliance with Commission orders, local competition rules, or merger conditions.

A recent analyst report issued from Morgan Stanley on September 26, 2001, shows that the non-weighted CLEC index has decreased 62.3% year-to-date. ALTS has seen a decrease of almost 50% of its network membership as competitive carriers either go out of business or scale back spending significantly.

In the meantime, the Commission has granted six RBOC applications for authority to provide long distance service within a service territory.² Of the six applications, the U.S. Department of Justice recommended denying four.³ Of the two that the DOJ did not recommend denying (Verizon – CT and SBC – Texas) the DOJ based its recommendation on very limited or special circumstances.⁴

Moreover, there has been no resolution on several critical competitive issues.⁵ When issues are brought to the attention of the FCC, the typical response is to instruct the

¹ See FCC News Release issued October 26, 199.

² SBC-Texas, approved June 30, 2000 (CC Docket No. 00-65); SBC-Kansas/Oklahoma, approved January 22, 2001 (CC Docket No. 00-217); Verizon-Massachusetts, approved April 16, 2001 (CC Docket No. 01-9); Verizon – Connecticut, approved July 20, 2001 (CC Docket No. 01-100); and Verizon-Pennsylvania, approved September 19, 2001 (CC Docket No. 01-269).

³ Bell Atlantic-New York, CC Docket No. 99-295; SBC- Kansas/Oklahoma, CC Docket No. 00-217; Verizon-Massachusetts, CC Docket No. 01-9; Verizon-Pennsylvania, CC Docket No. 01-269.

⁴ In Connecticut, the DOJ based its recommendation on the fact that the service territory was significantly limited and the mode of serving customers would stem from New York. In Texas, the DOJ initially denied granting recommendation for approval and reversed itself merely one month after its initial recommendation based on subsequent filings by SBC-Texas and "promises of future compliance."

⁵ Over numerous objections, the FCC has not ruled on the critical EEL (Enhanced Extended Loops) that would enable a CLECs not collocated at central office to have access to the loop and transport component at cost-based rates. In the meantime, ILECs continue to game the process by "misinterpreting" Commission orders and forcing CLECs to take alternative, non-cost effective routes. The CLECs filed in the Verizon-Pennsylvania section 271 case that Verizon refuses to convert circuits using "no facilities" available" as an excuse to force CLECs to purchase out of the special access tariffs. Recently, Verizon withdrew its collocation tariff which nearly quadrupled power for collocation yet Verizon continues to

CLEC to file a complaint. When a complaint is filed, the typical response is that the existing rules do not create a cognizable claim and that the CLEC should go back to the Common Carrier Bureau to seek clarification of the rules so that a cognizable claim may be subsequently presented to the Enforcement Bureau. Competitors are thus trapped in an administrative Catch 22, with rules that do not allow parties to set forth a cognizable claim and an inability to obtain new rules or necessary clarification of existing rules which would allow the carrier to set forth a cognizable claim.

SBC Communications – A time Line of Frustration:

Since approving the SBC-Texas application on June 30, 2000, SBC has seen great success in the telecommunications industry. During its recent Annual Meeting, Ed Whitacre, SBC Chairman and CEO, reported explosive growth in the data and long distance markets. In addition, Mr. Whitacre revealed SBC's strategy for continued growth: ***maintain strong core local telephone business service***. Since SBC filed in Texas, 17 months ago, the Enforcement Bureau has fined SBC a mere \$270,500 even though SBC repeatedly violated – and continues to violate – Commission Orders, the Telecommunications Act, and the SBC/Ameritech Merger Conditions. Meanwhile, the CLEC index has dropped more than 78% in just one year.

The most recent SBC filing is deficient on several levels. The DOJ evaluation rightly recognizes several serious deficiencies including pricing, poor OSS, and lack of performance oversight and enforcement. CLECs report the same problems identified by the DOJ. Yet the CLECs fear that this application will be just one more blow to the face of competition. Grant of this application would constitute another in a line of recent decision that signal to SBC that it need not abide by the mandate of the Telecom Act and the FCC's implementing rules.⁶ The rules become empty rhetoric when they are not enforced or otherwise used to compel the RBOCs to open their markets. The timeline below shows a pattern of abuse by SBC and a pattern of scant action by the Commission to curb SBC's abuses. However, it's not too late. The FCC has the power to change the environment and help CLECs turn the dismal market around. As such, ALTS urges the Commission to use all of its enforcement authority in order to bring the industry back to life.⁷

charge for "fused" power – power that is not used. The FCC's response is to urge CLECs to file a complaint (See Verizon Tariff Transmittal No. 94, September 25, 2001).

⁶ Also notable is that SBC admitted that it filed incorrect data in its Kansas/Oklahoma section 271 filing.

⁷ Section 271(d) of the Communications Act of 1934, as amended (The Act), grants the Commission enforcement authority to ensure that a Bell Operating Company (BOC) continues to comply with the market opening requirements of section 271 after the Commission has approved its application to provide long distance service within a state within its region. The Commission may take enforcement action if, at any time after approval of the application, it determines that a BOC "has ceased to meet any of the conditions required for such approval." After "notice and an opportunity for hearing" the Commission may (i) issue an order to the BOC to correct the deficiency; (ii) impose a forfeiture penalty on the BOC pursuant to title V; or (iii) suspend or revoke the BOC's section 271 authority. Section 271(d)(6)(A)(iii) allows the Commission to issue a stand-still order which would prohibit a BOC from enrolling additional subscribers for long distance service and from marketing and promoting long distance service. Under

April 5, 2000, SBC filed its Texas application (CC Docket 00-65). On May 12, 2000, the DOJ found that SBC had not shown that it was providing nondiscriminatory treatment to competitors offering services based on DSL-capable loops. The DOJ also advised that SBC's performance regarding hot cuts for analog loops and timely interconnection trunks was questionable. The DOJ also cited problems with SBC's performance data. On June 13, 2001, just one month later, the DOJ reversed itself based on "additional data" SBC filed during the course of the application proceeding, even though the FCC has repeatedly stated that a section 271 application must be complete as of the date filed.

June 30, 2000, the FCC approves the SBC-Texas application.

October 19, 2000, the Commission finds that Ameritech violated the Communications Act by offering long distance service through its 800 number ("1-800-AMERITECH"). No penalties were imposed.

October 26, 2000, SBC files its 271 application for Kansas and Oklahoma. On December 4, 2000, the DOJ denies recommending approval based on UNE prices and insufficient evidence of nondiscriminatory access to OSS in Kansas and Oklahoma.

December 20, 2000, the Enforcement Bureau *proposes* an \$88,000 fine for violating reporting requirements pursuant to the *SBC/Ameritech Merger Order*. The Bureau noted that the Commission's ability to detect possible discriminatory conduct by SBC against its competitors depends upon SBC's strict compliance with the approved terms and conditions of the Performance Plan.

January 18, 2001, the Enforcement Bureau *proposes* a \$94,500 fine against SBC for violating the Commission's collocations rules (also in violation of the SBC/Ameritech merger conditions).

January 22, 2001, the FCC approves SBC's Kansas and Oklahoma 271 application.

March 15, 2001, the Enforcement Bureau *imposes* an \$88,000 fine against SBC for failing to comply with the SBC/Ameritech Merger Conditions. An independent auditor revealed that SBC used incorrect benchmarks and excluded key data from the reports for a period of up to **13 months**. In imposing the fine, the Bureau noted that the

271(d)(6)(A)(ii), the Commission may assess monetary forfeitures against non-compliant BOCs pursuant to section 503(b) of the Act by issuing a notice of apparent liability. Under 271(d)(6)(A)(i), the Commission may issue an order requiring a non-compliant BOC to correct any deficiencies. The Commission also maintains its pre-existing enforcement powers, including its authority under sections 206-209 of the Act, which allow it to resolve formal complaints filed by competitors affected by non-compliant BOCs and award damages. Pursuant to section 271(d)(6)(B), the Commission is required to review formal complaints alleging 271 violations within 90 days.

Commission's ability to detect possible discriminatory conduct by SBC against its competitors depends upon SBC's strict compliance with the approved terms and conditions of the Performance Plan.

April, 27, 2001, SBC reports at its annual meeting that since last year, the company's data revenues has increased 39.9 percent to \$2.1 billion. The number of DSL customers grew from 201,000 to 954,000, and the company launched long-distance service in three states and currently has more than 2.2 million long distance lines in Texas, Oklahoma and Kansas. Chairman and CEO, Ed Whitacre, stated "We believe that the right strategy for creating shareholder value includes becoming a broadband services company, providing long distance to all of our customers, and participating in the exploding wireless voice and data business *while maintaining a strong core local telephone service business*." (See www.sbc.com/News April 27, 2001).

May 24, 2001, the Enforcement Bureau *imposes* a \$94,500 fine against SBC for violating the Commission's collocation rules (only four months after the January 18th fine). The investigation also revealed that SBC had violated the collocation rule in numerous other instances.

May 29, 2001, the FCC *affirms* the \$88,000 fine proposed March 15, 2001.

August 20, 2001, SBC files for section 271 approval in Arkansas and Missouri.

August 28, 2001, two CLECs file a complaint with the FCC against SBC. The complaint alleges, among other things, that SBC refuses to provide shared transport for the purposes of routing intraLATA toll traffic.⁸ SBC is obligated to provide shared transport as an unbundled network element (UNE) pursuant to the Act and to the *SBC/Ameritech Merger Order*. Even though shared transport is available as a UNE for purposes of routing intraLATA toll traffic in Kansas and Oklahoma (as part of SBC's efforts to obtain section 2721 authority in those states), CLECs are unable to obtain shared transport in California, Illinois, Ohio, Wisconsin, and Connecticut. Obviously the fines did not act as a deterrent.

September 10, 2001, the DOJ files its evaluation in the SBC AK/MO Section 271 application. The most recent SBC filing is deficient on several levels. The DOJ evaluation does not recommend approval based on several factors including pricing, poor OSS, and lack of performance oversight and enforcement. CLECs report the same problems identified by the DOJ.

September 26, 2001, Morgan Stanley reports that the local competitive carrier group has *fallen 78.6% year-to-date*. This compares to a decrease in the S&P 500 of

⁸ *In the Matter of CoreComm Communications, Inc. and Z-Tel Communications, Inc., Complainants v. SBC Communications, Inc., et al.*, August 28, 2001.

26.8% year-to-date and a decrease in the NASDAQ of 42.4% year-to-date. The non-weighted CLEC index has ***decreased 62.3%*** year-to-date.

Conclusion

ALTS has been clear in its previous section 271 filings that enforcement action post section 271 approval is not as effective as the “irreversibly open to competition” standard. The enforcement action taken against SBC to date proves that neither the merger conditions nor the long distance applications effectively kept SBC’s behavior in check. The Commission must take stronger enforcement measures in addition to closer scrutiny for BOC section 271 applications. ALTS encourages the Commission to take the right step in this application and deny it outright. Clearly SBC should not be rewarded with long distance authority where there continue to be problems with compliance.

Sincerely,

/s/

Jonathan Askin
Kimberly M. Kirby
Teresa K. Gaugler

